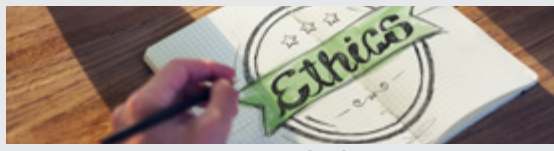


Q&A



LAWYER LIABILITY AND ETHICS

Court Declines to Impose Reciprocal Discipline



Joseph Brophy

A recent case out of the Virgin Islands provides a rare example of one court refusing to summarily impose reciprocal discipline on a lawyer because the disciplining court did not afford the lawyer sufficient due process. In this case, the Supreme Court of the Virgin Islands reminded the Third Circuit Court of Appeals what the great Walter Sobchak once said to his bowling opponent during a league game in the movie *The Big Lebowski*: “Smokey this is not ‘Nam, this is bowling. There are rules.” While attorney discipline may not be bowling, there are indeed rules.

In July 2021, the mother of a client represented by Lawyer in a criminal proceeding in the United States District Court, District of the Virgin Islands, sent a letter to the federal court alleging that Lawyer engaged in certain misconduct. The chief judge for the federal court in the Virgin Islands recused himself and referred the matter to the chief judge of the Third Circuit Court of Appeals, who in turn appointed a magistrate judge from the Western District of Pennsylvania to oversee the matter.

In December 2021, the magistrate judge issued a report and recommendation. Before doing so, the magistrate judge did not hold an evidentiary hearing and did not interview Lawyer, his client, or the client’s mother who wrote the letter that initiated the investigation. Rather, the magistrate judge undertook an investigation into other matters in which Lawyer was disciplined by the federal court in the last five years. There were eight such matters in which Lawyer was either fined by the court or removed from court-appointed representation. The magistrate contacted six individuals involved in those other eight matters. The report did not identify the witnesses but provided a summary of what they told the magistrate judge.

The magistrate’s report concluded that Lawyer long “had problems with meeting court deadlines, making timely court appearances, successfully e-filing documents, communicating adequately with clients, and the like,” that he “may be suffering from an impairment of some kind, possibly due to substance abuse,” and that his “law practice has become increasingly disorganized and haphazard, questioning whether he still maintains a law office at all.” The magistrate judge recommended a two-year suspension and a comprehensive physical and mental health examination as a condition of reinstatement.

Lawyer objected to the report and recommendations on due process grounds. The district court—consisting of 13 judges of the United States Court of Appeals for the Third Circuit, also sitting by temporary designation as judges of the District Court—issued an order overruling Lawyer’s objection. The district court concluded

that the magistrate judge provided Lawyer an opportunity to be heard by being allowed to lodge objections to the report and was given appropriate notice.

The Virgin Islands’ Bar filed a copy of the federal court’s order with the Judicial Branch of the Virgin Islands, which maintains its own bar separate from the federal bar. Lawyer challenged the imposition of reciprocal discipline. The Virgin Islands’ Bar sought guidance from the supreme court regarding what process was required before summarily imposing reciprocal discipline. The Supreme Court of the Virgin Islands noted that because “attorney discipline proceedings, while nominally civil, are quasi-criminal in nature,” a lawyer accused of ethical misconduct is entitled to considerable due process protections. Nevertheless, a lawyer fighting the imposition of summary reciprocal discipline has a heavy burden.

However, in this case that burden was met. The Virgin Islands court noted that under the federal court’s own local rules (as well as the ABA’s rules and United States Supreme Court precedent), a lawyer subject to disciplinary proceeding had the right to be heard before a magistrate judge issues a report/recommendation and to object after the report and recommendations were issued. In other words, the accused attorney has the right to be heard by the investigator (magistrate) and the ultimate adjudicator (the district court). The Virgin Islands court concluded that the federal court’s deprivation of Lawyer’s right to be heard before the report was issued was not cured by the Lawyer’s opportunity to object after the report was issued. Such a cure was not possible when the plain language of the rule required that the Lawyer be the opportunity to be heard before and after the magistrate issued a report.

Ultimately, Lawyer may still be subject to discipline before the Virgin Islands’ Bar. However, the Office of Disciplinary Counsel must first conduct its own independent investigation into the matters covered by the federal court’s order of suspension. Because of the lack of due process, the Supreme Court of the Virgin Islands will not simply take the federal court’s word for it. The federal court was almost certainly right on the merits—even Lawyer did not seem to fight hard on those. But the Virgin Islands court was right to hold the federal court to the rules that it wrote. Best of all, unlike in the case of the aforementioned Mr. Sobchak in *The Big Lebowski*, no one had to pull a gun on anyone to make sure the rules were followed. ■

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